



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CRIMINAL CASE NO. 31 OF 1999**

**REPUBLIC ::: PROSECUTOR**

**VERSUS**

**MUSYOKA MAINGI NGULI ::: ACCUSED**

**Coram: J. W. Mwera J.**  
**10 Ngolya Advocate for Accused**  
**Orinda Advocate for Republic**  
**C.C. Muli**

\*\*\*\*\*

**R U L I N G**

This is a murder trial. Its conduct falls under PART IX PROCEDURE IN TRIALS BEFORE THE HIGH COURT (of the Criminal Procedure Code) Under a subheading CASE FOR THE PROSECUTION S. 301 says:

20 “301(1) The prosecution shall not, without leave of the court, the reasons for which shall be recorded, adduce evidence at a trial where a statement in relation to the evidence was not presented at the committal proceedings, unless the accused person or his advocate has received a reasonable notice in writing of the intention to adduce that evidence.

(2) A notice under subsection (1) shall be accompanied by a copy of a statement, relating to that additional evidence, complying with section 231(3)”

30 On 2.7.2001 after hearing the Learned State Counsel on his intention to bring additional evidence, this court granted leave stating in pertinent parts of its ruling

***: “..... and the Learned State Counsel having asked for 2 weeks only to bring full and complete evidence by witnesses (additional ) and or items, may that be granted. So further hearing on 16.7.2001.”***

Come 16.7.2001 and the court is set to hear such witnesses (additional) as the 10 Learned State Counsel had, together with any items (exhibits) that would be produced. Then Mr. Ngolya for the accused brought it to the court’s attention that he had just received the notice under S.301 Criminal Procedure Code that morning, with the names of Sgt. Peter Mulei and P.c. Ademba as the additional witnesses. That was the same time he was also given P.C. Ademba’s statement and there was none for Sgt. Mulei and no exhibits. Mr. Ngolya, although ready to go on with that “unreasonable” notice, still seriously doubted the Republic’s compliance with S.301 Criminal Procedure Code – there was no statement from Sgt. Mulei attached and no promised exhibits. He thought that the trial was about to be conducted by way of ambush – a situation that perpetually put his client in uncertainty as to the scope of the 20 case he was to face. So he asked this court go on with the trial and order that there would be no statement from Sgt. Mulei and no exhibits at a later stage. The Learned State Counsel told the court that he had done his best and was continuing in that effort to put as complete a case as he could before the court and that he should not be hindered in that.

Having heard both sides, this court is of the view that S.301 Criminal Procedure Code is intended to cater for situations where further evidence relevant and vital to a murder trial comes up after committal and even during trial as the case is here. On coming up with such evidence, then the State must give reasons and on being satisfied this court may grant leave that that additional evidence be adduced. A

murder case affects, like any other, two parties – the accused and the deceased’s family. The State is thus bound to bring a full and complete case to bear lest injustice and prejudice be spawned and particularly on the accused. So a full and complete case is in the interests of justice.

That however calls for the State to notify the accused’s side of the intention to call additional evidence. The law says that that notice has to be accompanied with the statements plus exhibits, if it can be so said, so that the accused’s side is not taken by surprise. It must have time to consider this additional evidence, place it in the context of the whole case and consider how to approach it. In this case only P.C. Ademba’s evidence passes muster under S.301 Criminal Procedure Code as at 16.7.2001. The Learned State Counsel alluded to possible exhibits but there was no mention of that. Sgt. Mulei’s name was floated but no statement of his evidence was appended. Had the hearing gone on on 16.7.2001 Sgt. Mulei would not have been heard because his would not be considered additional evidence under S.301 Criminal Procedure Code. There was just no evidence to be had from him by way of a statement being served 20 with reasonable notice or notice at all.

However time having passed since 16.7.2001 it is assumed that the Learned State Counsel has supplied a statement by Sgt. Mulei and this court will be inclined to accept it as basis of his testimony. If that has not been done since 16.7.2001 this court is unable to guess what the Learned State Counsel will say next. Otherwise from the principle enunciated as enshrined in S.301 Criminal Procedure Code, and an noble and important principle it is in criminal justice, it should be complied with always in advance i.e. on reasonable notice (both for the statements and list of exhibits). Hearing to resume with the evidence from witnesses whose statement have been served on the defence side.

**Delivered on 26th July 2001.**

**10 J. W. MWERA**

**JUDGE**